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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1946

DISTRICT OF COLUMBIA, *Petitioner*,

v.

JOHNSON & WIMSATT, INC., *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF FOR PETITIONER IN SUPPORT OF PETITION

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DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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IN THE SUPREME COURT OF THE UNITED STATES

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No. ------

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the District of Columbia, respectfully shows and represents unto your Honors that:

STATEMENT OF THE MATTER INVOLVED

This case involves the construction and application of the District of Columbia Income Tax Act with respect to the tax on corporations.

The tax years involved are the calendar years 1939 and 1940 (R. 22). As originally enacted, and as in effect during those years, the District of Columbia Income Tax Act imposed a tax upon the taxable income "from District of Columbia sources of every corporation, whether domestic or foreign," except certain organizations specifically exempted (*infra*, p. 11).

The litigation in this case first arose in the Board of Tax Appeals for the District of Columbia on an appeal by respondent from denial by the Assessor of the District of a claim for refund of certain taxes paid by respondent in the total sum of $9,771.08 (R. 10).

The respondent is a Delaware corporation which was during the years involved, and is, engaged in the wholesale lumber business with its lumber yard and principal place of business in the District (R. 9, 11).

The income upon which the disputed taxes were assessed was the result of certain sales made by respondent during the years in question (R. 9, 10, 11, 18, 19). The Board of Tax Appeals for the District of Columbia found as a fact that the sales "were either contracted for by petitioner with its customers in the District of Columbia, or if the sales were initiated outside of the District, were subject to confirmation by petitioner at its District of Columbia Office." (R. 10). The sales were made, as the Board found, "for delivery by mills from outside of the District to petitioner's customers outside of the District" (R. 10).

The Board of Tax Appeals concluded that title to the merchandise which was the subject of the sales did not pass within the District and that, therefore, the respondent did not as the result of such sales receive taxable income from District of Columbia sources within the meaning of Sec. 2(b) of the District of Columbia Income Tax Act.[1] In arriving at that conclusion the Board relied on a recent decision of the United

[1] 53 Stat. 1087; Sec. 47-1502(b), D. C. Code 1940.

States Court of Appeals for the District of Columbia [2] which the Board said (R. 11, 12) *made the place of passage of title the sole test of taxability.*

From the decision of the Board of Tax Appeals, your petitioner, the District of Columbia, petitioned for review by the United States Court of Appeals for the District of Columbia (R. 13). That Court affirmed the decision of the Board of Tax Appeals for the District of Columbia, holding that the income in question *was not from sources within the District solely because title to the goods sold passed without the District* (R. 23, 24).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered March 24, 1947. The jurisdiction of this Court to issue the writ applied for is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938, c. 229; U. S. Code, 1940 ed., Title 28, Sec. 347(a)).

QUESTIONS PRESENTED

1. Under the District of Columbia Income Tax Act, does the liability of corporations for tax on income resulting from the sale of, or dealings in, tangible personal property depend solely upon a determination of whether legal title to such property passed within or without the District?

2. Stated otherwise, does the jurisdiction where, under the general law of sales, legal title to tangible personal property passes from the seller to the buyer, have the sole power to tax the income resulting from the sale of, or dealings in, such property to the exclusion of all other tax jurisdictions, regardless of the location of the seller in another jurisdiction, and

[2] *Electric Storage Battery Company, Inc.* v. *District of Columbia*, ____ U. S. App. D. C. ____, 155 F. 2d 867, decided May 20, 1946.

notwithstanding commercial activities of the seller in connection with the sale in such other jurisdictions?

3. Is not the execution or confirmation in the District of Columbia of contracts of sale of tangible personal property made a taxable event under the District of Columbia Income Tax Act, and, therefore, is not the income resulting from such sales "income from sources within the District of Columbia" within the meaning of the statute?

4. Was not the income in controversy "income from sources within the District of Columbia" or, at least, "income with respect to sources of income within and without the District" such as should have been apportioned under Sec. 4(b) of the District of Columbia Income Tax Act, *infra*, p. 12?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Petitioner believes that there are in this case all those reasons mentioned in Rule 38, paragraph 5(c), of the Revised Rules of this Honorable Court which will be considered in determining whether a writ of certiorari will be granted to the United States Court of Appeals for the District of Columbia.

1. *The United States Court of Appeals for the District of Columbia has decided a question of general importance in this case which has not been, but should be, settled by this Honorable Court.*

The District of Columbia Income Tax Act is applicable to all corporations, whether domestic or foreign, which engage in business or commercial activity in the District. Various commercial activities by such corporations incident to the production of income, including income resulting from the sale of tangible personal property, usually occur in more than one tax jurisdiction. The determination of the taxable source of such income requires consideration and analysis of the factors

employed in the production of income—use of capital, employment of labor, consummation of contracts of sale, and actual passage of title to the goods sold. Which of these factors constituted a taxable event, under the District income tax law, as originally enacted, is the general question involved.

In addition to the District of Columbia, there are some thirty-three States which impose taxes on, or measured by, income from sources within the taxing jurisdiction.[3] Many of such State laws provide for the allocation and apportionment of income, with no exception made as to income resulting from the sale of tangible personal property.[4] A definitive opinion by this Honorable Court indicating the taxable significance, for purposes of allocation and apportionment, of the various factors involved in the production of income, is essential not only to the proper administration of the District income tax law, but as well to corporations whose business activities extend into the District of Columbia and into those States having income tax statutes similar to the District's. Such an opinion would also appear to be essential for the proper administration of the income tax laws of such States.

The District statute is closely related to the Federal income tax law (R. 24). The Federal Internal Revenue Code provides that "In the case of a foreign corporation gross income includes only the gross income from sources within the United States."[5] The Federal Internal Revenue Code also provides a method of treatment of income resulting from the purchase of personal property within and its sale without the United States and from the purchase thereof without and its sale within the United States.[6] Because the word "sale," in its narrowest sense, has been held to mean the technical passage

[3] See "Allocation of Income in State Taxation," *Altman and Keesling* (CCH, 1946), c. I, p. 19; Sec. 119, Internal Revenue Code; Sec. 2(b) of the District of Columbia Income Tax Act, *infra*, p. 11.

[4] Id. footnote 3, c. VII, pp. 129-159, and Sec. 4(b), *infra*, p. 12. No apportionment of the income from the sales in question was made, but both Sec. 4(b) of the Act and regulations made under the Act provided for allocation and apportionment.

[5] Sec. 231(c), I. R. C.

[6] Sec. 119(e)(2), I. R. C.

of title to personal property sold, and, in a broader sense, to mean the consummation of contracts of sale,[7] confusion has resulted as to whether the narrow definition is to be used in allocating the source of income, or whether both meanings of the word are to be employed for the purposes of allocation and apportionment of income resulting from the sale of such property. For this reason, it would seem that a determination of this case would be valuable in the administration of the Federal income tax law with respect to the taxes imposed thereunder on the income of foreign corporations.

2. *The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction or application of a statute enacted by Congress which has not been, but should be, settled by this Honorable Court.*

While this Honorable Court has had for consideration the construction of the statute involved with respect to the taxes imposed thereunder upon individuals,[8] this Court has not considered the construction of the statute with respect to the taxes imposed thereunder upon the income of corporations. It is of great importance that corporations as well as individuals have their liability under the District income tax law clearly defined.

It is extremely important to the District of Columbia Government to have the basis for taxation of corporate income under the statute settled.

3. *This case presents the situation where the United States Court of Appeals for the District of Columbia has not given proper effect to applicable decisions of this Honorable Court.*

This case presents a situation where the United States Court of Appeals for the District of Columbia has not given proper

[7] See pp. 19, 20 of the brief in support of this petition.
[8] *District of Columbia* v. *Murphy et al.*, 314 U. S. 441, 86 L. ed. 329, 62 S. Ct. 303.

effect to applicable decisions of this Court, particularly *Compania General de Tabacos de Filipinas* v. *Collector of Internal Revenue*, 279 U. S. 306, 73 L. ed. 704, 49 S. Ct. 304, and *Norfolk and Western Ry. Co.* v. *Sims*, 191 U. S. 441, 48 L. ed. 254, 24 S. Ct. 151.

WHEREFORE, Your petitioner prays the allowance of a Writ of Certiorari to the United States Court of Appeals for the District of Columbia in this cause, and that said cause may be reviewed and determined by this Honorable Court, and that the judgment of said Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

DISTRICT OF COLUMBIA,
Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Board of Tax Appeals for the District of Columbia (R. 11) is reported in 74 W. L. R. 569. The opinion of the United States Court of Appeals for the District of Columbia (R. 22) is not yet reported.

JURISDICTION

The grounds upon which the jurisdiction of this Court is invoked are stated in the petition.

STATEMENT OF THE CASE

In 1939 and 1940, respondent, Johnson & Wimsatt, Inc., a Delaware corporation, was engaged in the wholesale lumber business with its principal office and its lumber yard in the District of Columbia (R. 9). During 1939 its gross sales were $3,154,428.36. During 1940 its gross sales were $5,316,756.25 (R. 9). Respondent filed its District of Columbia income tax returns for 1939 and 1940 (R. 10), reporting therein its net income from all sales as $85,448.24 for 1939 and $212,050.33 for 1940, and paid taxes on the amount of net income so reported (R. 10). The taxes so paid amounted to $4,272.41 for 1939 and $10,602.52 for 1940 (R. 10). $1,920,972.73 of the gross sales made by respondent in 1939 and $3,828,591.71 of the gross sales made by respondent in 1940 resulted from sales made in the following manner:

> The sales made by respondent were either contracted for by respondent with its customers in the District of Columbia, or if initiated outside the District, were subject to confirmation by respondent at its District of Columbia office (R. 10). The merchandise sold by respondent was purchased by respondent from mills outside the District and was delivered by such mills to respondent's customers outside the District, without being in respondent's possession (R. 10, 20).

On June 27, 1942, respondent filed claims for refund of $2,601.81 of the amount paid by it as District of Columbia income taxes for 1939 and of $7,634.88 of the amount paid by it for 1940 (R. 10). Those amounts represented such proportions, as to each year, of the taxes paid by it as its sales made in the manner described in the preceding paragraph bore to its total sales (R. 10). The Assessor of the District of Columbia denied each claim for refund in its entirety (R. 10), and respondent seasonably appealed to the Board of Tax Appeals from the action of the Assessor disallowing the claims (R. 1). At the hearing, respondent reduced its claim for refund of the 1939 disputed tax from $2,601.81 to $2,136.20, because only that latter amount had been paid within two years prior to the filing of the claims for refund and the statute provides that "the amount of the refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim"[9] (R. 10).

The Board of Tax Appeals for the District of Columbia concluded, as matters of law, that title to the merchandise which was the subject of the sales in controversy did not pass within the District; that the sales did not, therefore, result "in taxable income from District of Columbia sources, within the meaning of Title II, Section 2(b)" of the District of Columbia Income Tax Act; and that respondent was therefore entitled

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[9] 53 Stat. 1102, Sec. 47-1534, D. C. Code 1940.

to a refund of $2,136.20 of the 1939 income tax paid by it and a refund of the entire amount of $7,634.88 of its 1940 income tax (R. 10).

The District of Columbia petitioned the United States Court of Appeals for review of the decision of the Board of Tax Appeals (R. 13). The United States Court of Appeals affirmed the decision of the Board of Tax Appeals, holding that the income in question was not from sources within the District solely because title to the property sold passed without the District (R. 22-24).

The amount involved is $9,771.08 (R. 13).

SPECIFICATION OF ERRORS

The United States Court of Appeals for the District of Columbia erred:

A. In holding that the passage of title to tangible personal property from the seller to the buyer within or without the District is the sole test to be applied in determining whether the income resulting from the sale of such property is subject to tax under the District of Columbia Income Tax Act.

B. In holding that the income in question was not "from District of Columbia sources" within the meaning of the statute involved.

STATUTES INVOLVED

Sec. 2(b) of the District of Columbia Income Tax Act, 53 Stat. 1087 (Sec. 47-1502(b), D. C. Code 1940) provided, during the tax years involved, as follows:

> "(b) TAX ON CORPORATIONS.—There is hereby levied for each taxable year upon the taxable income from District of Columbia sources of every corporation, whether domestic or foreign (except those organizations expressly exempt under paragraph (d)

of this section), a tax at the rate of 5 percentum thereof." [10]

Sec. 4(a) of the District of Columbia Income Tax Act, 53 Stat. 1088 (Sec. 47-1504(a), D. C. Code 1940) provides as follows:

> "(a) DEFINITION.—The words 'gross income,' as used in this title, include gains, profits, * * * or income derived from professions, vocations, trades, businesses, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership, or use of, or interest in, such property; also from * * * transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever."

Sec. 4(b) of the District of Columbia Income Tax Act, 56 Stat. 1088 (Sec. 47-1504(b), D. C. Code 1940) provides as follows:

> "(b) * * * In the case of any corporation, gross income includes only the gross income from sources within the District of Columbia. The proper apportionment and allocation of income with respect to sources of income within and without the District may be determined by processes or formulas of general apportionment under rules and regulations prescribed by the Commissioners."

Sec. 29(a) of the District of Columbia Income Tax Act, 56 Stat. 1100 (Sec. 47-1529(a), D. C. Code 1940) provides as follows:

> "(a) DUTIES OF ASSESSOR.—The assessor is hereby required to administer the provisions of this title. The assessor shall prescribe forms identical with those utilized by the Federal Government, except to the extent required by differences between

[10] Sec. 2(b) was amended in 1942—see p. 21, *infra*.

this title and its application and the Federal Act and its application. He shall apply as far as practicable the administrative and judicial interpretations of the Federal income-tax law so that computations of income for purposes of this title shall be, as nearly as practicable, identical with the calculations required for Federal income-tax purposes. As soon as practicable after the return is filed the assessor shall examine it and shall determine the correct amount of the tax."

Sec. 43 (12) of the District of Columbia Income Tax Act, 53 Stat. 1106 (Sec. 47-1543(12), D. C. Code 1940) provides that:

"(12) The words 'trade or business' include the engaging in or carrying on of any trade, business, profession, vocation or calling, or commercial activity in the District of Columbia; * * *."

SUMMARY OF ARGUMENT

1. Under the authority of Norfolk & Western Ry. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 S. Ct. 151, the actual sales in question (as distinguished from the technical legal passage of title) were made in the District. Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 279 U. S. 306, 73 L. ed. 704, 49 S. Ct. 304, is authority for the principle that if the final acts consummating the sales, which were the sources of the income in question, took place in the District, such income is from sources within the District.

2. In Commissioner of Internal Revenue v. East Coast Oil Co., 85 F. 2d 322, cert. den. 299 U. S. 608, the Fifth Circuit Court of Appeals held that the income there in question was earned when, and had its source in that place where, title to the goods sold passed from the seller to the buyer.

3. If there is only one geographical source of income resulting from the sale of tangible personal property, then the decision of the Fifth Circuit Court of Appeals in the East Coast case supra,

is inconsistent with the theory of, and rule pronounced in, the Compania General case, supra.

4. The acceptance in the District of orders for the sale of tangible personal property was, in terms, made a part of the statute in question, and thus a taxable event, by the Congress in an amendment enacted subsequent to the tax years here involved. The amendment was stated to be a clarifying act, and such taxable event was therefore inherently a part of the statute as originally enacted.

5. Technical passage of title under the general law of sales is not the sole test of taxability of income resulting from the sale of, or dealings in, tangible personal property; taxability may be determined by one or more of a number of taxable events, a theory that has been generally accepted.

ARGUMENT

I

Brief discussion of the statute.

The District of Columbia Income Tax Act supplanted [11] the District of Columbia Business Privilege Tax Act.[12]

As originally enacted, Sec. 2(b), *supra*, levied a tax at the rate of 5% on the taxable income "from District of Columbia sources of every corporation, whether domestic or foreign" with certain exceptions not here material. As originally enacted, that section contained no mention of any "sale," much less any "passage of title" or "acceptance of orders." However, in Sec. 4(a), *supra*, the words "gross income" are defined so as to include not only income derived from "vocations, trades, businesses, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership, or use of, or interest in, such property" but "also from * * *

[11] *Eastman Kodak Co.* v. *District of Columbia*, 76 U. S. App. D. C. 339, 131 F. 2d 347.
[12] 50 Stat. 690.

transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever." [13]

The Court below pointed out (R. 22) that Sec. 4(b), *supra*, provides that "in the case of any corporation, gross income includes only the gross income from sources within the District of Columbia." However, the Court below did not point out that the same section of the statute also provides that "The proper apportionment of income with respect to sources of income within and without the District may be determined by processes or formulas of general apportionment under rules and regulations prescribed by the Commissioners."

In Sec. 43(12) of the District statute, *supra*, the words "trade or business" are defined so as to "include the engaging in or carrying on of any trade, business, profession, vocation or calling, or commercial activity in the District: * * *."

Finally, by an amendment of February 2, 1942 [14] (which was not made applicable to the tax years here involved), it was provided that "Every corporation * * * engaging in or carrying on any business, or receiving income from District of Columbia sources, shall obtain a license so to do on or before the 1st day of January of each year: * * *," for which a fee of $10 is imposed.

Thus, while the District Income Tax Act, as its title indicates,[15] was designed to produce revenue by a direct tax on income, nevertheless the Act does have certain features of an excise or franchise tax not dissimilar to the features of the old District of Columbia Business Privilege Tax Act,[16] which it supplanted. The mere fact that the tax is measured by a percentage of net income does not prevent its being in the

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[13] Sec. 4(a) originally contained the heading "Of Individuals," but was later changed by an amendment of February 2, 1942, 56 Stat. 43, to read "Definitions," since the provisions of the section are equally applicable to corporations.

[14] 56 Stat. 45, Sec. 47-1547, Supp. V, D. C. Code 1940.

[15] Public Law No. 225, 76th Congress (H. R. 6577)—"To provide revenue for the District of Columbia, and for other purposes."

[16] Id. footnote 12, *supra*.

nature of an excise or business privilege tax. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45; *Pittsburgh Life & T. Co.* v. *Young*, 172 N. C. 470, 90 S. E. 568.

II

The income in question was from sources within the District within the meaning of the District of Columbia Income Tax Act

During the tax years here involved, respondent was engaged in the wholesale lumber business, with its lumber yard and principal place of business in the District (R. 11, 22). As both the Court below and the Board of Tax Appeals for the District of Columbia stated, the contracts of sale were either executed or confirmed at the office of the corporation in the District (R. 11, 22). The opinion of the Court below does not disclose what the activities of respondent in connection with the sales in question were, if any there were, which caused the income resulting therefrom to be from sources without the District (R. 22-24).

Aside from other activities which the corporation engaged in during the tax years involved (R. 11), it seems abundantly clear that the execution or confirmation of the contracts of sale in the District were sales or dealings in property, growing out of the ownership, or use of, or interest in, such property by the respondent, and that these things which the respondent did in the District were transactions of a business carried on for gain or profit within the meaning of Sec. 4(a), *supra*. Furthermore, it is submitted, these activities of respondent were commercial activities in the District and, thus, a "trade or business" in the District within the meaning of Sec. 43(12), *supra*.

Under the District of Columbia Income Tax Act, we submit, "a local transaction is made the taxable event" upon which depends the liability of corporations for tax on the income

flowing from the local transaction. Cf. *International Harvester Co. et al.* v. *Department of the Treasury et al.*, 322 U. S. 340, 88 L. ed. 1313, 64 S. Ct. 1019; *Buick Motor Co.* v. *Milwaukee*, 48 F. 2d 801 (1931), cert. den. 284 U. S. 655; *Maytag Co.* v. *Commissioner of Taxation*, 218 Minn. 460, 17 N. W. 2d 37 (1944); *Montgomery Ward Co.* v. *State Tax Commission*, 151 Kan. 159, 98 P. 2d 143.

III

The Court below was in error in holding that the passage of title within or without the District was the sole test of taxability of income derived as the result of the sale of tangible personal property.

The Court below stated that:

> "Even if the question were one of first impression, we should have to give great weight to the necessity for a simple rule upon this subject, because commercial activity is general across state lines, and many states have income taxes. The confusion which would ensue from multiplied income taxation of purchase and sale transactions, or from a vague rule which would depend upon an evaluation of numbers of factors, would impel us toward the adoption of a simple and clear rule drawn from the general law of sales. However, we are not compelled to act upon those considerations." (R. 23)

With due respect to the Court below, it is submitted that the suggestion by that Court in the present case that the "confusion which would ensue from a multiplied income taxation of purchase and sales transactions, or from a vague rule which would depend upon an evaluation of numbers of factors," would impel it to adopt a simple and clear rule drawn from the "general law of sales," is contrary to the plainly expressed provisions of the District statute, for the

following, among other, reasons: Under Sec. 4(b), *supra*, it is provided that "The proper apportionment and allocation of income with respect to sources of income within and without the District may be determined by processes or formulas of general apportionment under rules and regulations prescribed by the Commissioners." Article 3(b) (1) of the Income Tax Regulations provided [17] that:

> "Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be allocated to the District shall be taken to be such percentage of the total of such income as the sales within the District during such taxable year bear to the total sales of the corporation for such taxable year. *Other factors, such as the average monthly value of tangible personal property held and owned by the corporation in connection with its trade or business in the District and the total value of such property held and owned by the corporation in connection with its trade or business, may also be considered whenever, in the opinion of the Assessor, the use of such additional factors in the apportionment formula would result in a more equitable tax.*" (Italics supplied.)

In view of the foregoing provisions it seems clear that the tax is imposed upon the net income of corporations and that that portion of the gross income which is derived from sources both within and without the District is to be apportioned so as to distinguish that portion thereof which is derived from sources within the District from the portion derived from sources without the District. Under that regulation, a tax could be assessed by an apportionment formula embracing not only the sales factor but the additional factors prescribed by the italicized portion of the regulation. It is entirely possible that the use of such additional factors in the apportionment formula might result in a tax being assessed which would be

[17] Article 3(b)(1) was amended one or more times during 1939 and 1940, the tax years involved.
No apportionment of the income in question was made—see footnote 4, *supra*.

in excess of that which might have been assessed by the use of the sales factor alone, thereby, in effect, taxing income from sales not made in the District under any test. These matters were brought to the attention of the Court below in the brief filed there by this petitioner.

Furthermore, it is submitted, the income in question was income from sources within the District under the authority of *Compania General* v. *Collector, supra,* regardless of the provisions of the statute with respect to apportionment. There a provision of a Philippine income tax law was involved which imposed a tax upon income received "from all sources within the Philippine Islands" by foreign corporations. This Court held that if, in fact, the final acts of the taxpayer making effective the sales in question took place in the Philippine Islands as an incident to and part of its business there, the income from such sales was taxable under the statute. The Court felt that it was unimportant whether the merchandise sold was exported before or after its sale.

Norfolk & Western Ry. Co. v. *Sims, supra,* is authority for the principle that the substance of a sale is the agreement to sell and its acceptance, and that a sale may actually be made in one place even though technically the title to the property sold may have passed in another place.

Under the authority of the *Norfolk & Western* case, *supra,* the sales in the case at bar were made in the District of Columbia, and, under the rule in *Compania General, supra,* the income of respondent here in controversy was from sources within the District.

The court below decided that the income in question was not from sources within the District of Columbia under the authority of *Commissioner of Internal Revenue* v. *East Coast Oil Co., supra.* That case is authority, as the Court below construed it to be, for the theory that income resulting from the sale of tangible personal property is earned in that place where, and at the time when, title to the property sold passes from the seller to the buyer. The Court below observed (R.

23, 24) that "the Commissioner's argument (in the *East Coast Oil Co.* case), which is the same as that made to us by the District of Columbia in the case at bar, that *Compania General* v. *Collector* compelled a different result" was considered by the United States Board of Tax Appeals (now Tax Court of the United States).[18] (Parenthetical matter supplied.)

This Court denied certiorari in the *East Coast Oil Co.* case (299 U. S. 608), but the denial of a writ of certiorari is in no case equivalent to an affirmance of the decree or judgment sought to be reviewed, and imparts no expressions of opinion upon the merits of the case. *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U. S. 251, 60 L. ed. 629, 36 S. Ct. 269; *United States* v. *Carver*, 260 U. S. 482, 67 L. ed. 361, 43 S. Ct. 181; *Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401, 75 L. ed. 1142, 51 S. Ct. 498.

To say that the decision in the *East Coast Oil Co.* case, must be followed in determining liability under the District Income Tax Act would be to say, in effect, that Sec. 29(a) of the District Act (see R. 24) requires the District Assessor to follow interpretations of provisions of Federal law which, although repealed or replaced with new and different provisions, were, while in force, somewhat similar to, even though not identical with, provisions of the District Act. In this connection, it is quite obvious that the decision in this case would not make "computations of income for purposes" of the District Act "identical with the calculations required for Federal income-tax purposes," and yet such a result is the avowed purpose of Sec. 29(a) of the District Act.

The case at bar was decided by the Court below on March 24, 1947 (R. 22). On April 21, 1947, the Court below entered its opinion and judgment in the case of *District of Columbia* v. *The H. D. Lee Company, Inc.*, No. 9413, which opinion is as yet unreported. That case involved the construction and

[18] See in this connection pages 10, 11, and 12 of the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, No. 512, October Term, 1936, filed November 7, 1936, in this Court in the *East Coast Oil Co.* case, *supra*.

application of Sec. 2(b), *supra*, as amended by the Act of June 22, 1942,[19] which added the following provisos to Sec. 2(b):

> "*Provided, however,* That income derived from the procurement of orders for the sale of personal property by means of telephonic communication, written correspondence, or solicitation by salesmen in the District where such orders require acceptance without the District before becoming binding on the purchaser and seller and title to such property passes from the seller to the purchaser without the District is not from District of Columbia sources: *Provided further,* That income from the sale of personal property to the United States is not from District of Columbia sources, unless the taxpayer is engaged in business in the District and such property is delivered for use within said District."

In the *Lee* case the Court held that neither the acceptance of the orders nor the passage of the title had occurred within the District and that therefore the income in question was not taxable income from District of Columbia sources. After reaching that conclusion the Court stated that:

> "Since all elements of the above-quoted amendment of 1942 are met in this case, and under its provisions the income must be deemed to be from sources without the District, it is not necessary for us to consider now whether, if only the passage of title had occurred without the District, the income would be from sources without the District. *We held such to be the rule* in the *Johnson & Wimsatt* case (the case here at bar), which related to a year prior to the amendment. In *Electric Storage Battery Co.* v. *District of Columbia* (____ U. S. App. D. C. ____, 155 F. 2d 867), which related to both 1941 and 1942, both passage of title and acceptance of the orders occurred

[19] 56 Stat. 376, Sec. 47-1502(b), D. C. Code 1940, Supp. V.

without the District." (Parenthetical matter and emphasis supplied.)

If the inference may be drawn from the above quotation that the Court might place a different construction on the Act for years subsequent to the amendment of 1942 than it has in the case at bar, it would appear that such a result would not be consistent with the legislative history of the amendment. Concerning the amendment of 1942, the following appears in 88 Congressional Record 5390:

"AMENDMENT OF DISTRICT OF COLUMBIA INCOME TAX ACT

"The bill (H. R. 6953) to amend the District of Columbia Income Tax Act, as amended, and for other purposes, was considered, ordered to a third reading, read the third time, and passed.

"Mr. BURTON subsequently said: Mr. President, a few moments ago the Senate passed House bill 6953 to amend the District of Columbia Income Tax Act, as amended, and for other purposes. *It is a clarifying act*, and I think it will be helpful if I may have unanimous consent to place in the Record immediately following the passage of the bill a copy of the report of the Senate committee and also a copy of a letter from the Corporation Counsel addressed to me under date of June 11, 1942, explaining the reasons for the clarification. * * *" (Italics supplied.)

Considering the foregoing, what was the effect of the proviso contained in the 1942 amendment to Section 2(b), *supra*, with respect to solicitation of orders for the sale of personal property? It is an accepted rule of statutory construction that the general purpose of a proviso is to except something from the enacting clause or to restrain or modify that which immediately precedes it. *United States* v. *Morrow*, 266 U. S. 531, 534, 69 L. ed. 425, 45 S. Ct. 173; *Bride* v. *Macfarland*, 18 App. D. C. 120, 126, cert. den. 181 U. S. 620, 45 L. ed. 1031, 21

S. Ct. 924; *People* v. *Sischo*, 23 Cal. 2d 478, 144 P. 2d 785, 793, 150 A. L. R. 1431, 1440; 50 *Am. Jur.*, Statutes (1944 ed.), Sec. 438. However, a proviso is sometimes used for other purposes, such as to explain general words of enactment, to guard against a possible construction that was not intended and as a conjunctive to an independent paragraph. *Hall's Safe Co.* v. *Herring-Hall-Marvin Safe Co.*, 31 App. D. C. 498, 504; see also 50 *Am. Jur., supra*, Sec. 435, *et seq.* As stated in *United States ex rel. Southern P. R. Co.* v. *Lane*, 46 App. D. C. 74, 82:

> "* * * The rule of statutory construction is familiar, that a proviso must be interpreted in the light of the terms of the act to which it is attached. Its operation is usually confined to the clause or provision immediately preceding, but where necessary to give effect to the legislative intent it will be construed as applying to the entire act. * * *"

From a reading of the 1939 Act and the proviso added by the 1942 Act, it is clear that the amendment was intended to restrain or qualify the definition of "income from District of Columbia sources" as originally defined. Undoubtedly the 1939 Act imposed a tax upon gross income of corporations derived from the regular and sustained activities of their salesmen in the District. Sec. 2(b) as originally enacted was reenacted and the proviso added by the 1942 amendment. Accordingly, under Sec. 2(b), as amended, corporations are subject to taxation upon income derived from "sales or dealings in property," or from "transactions of any business carried on for gain or profit," or from "commercial activity," or "from any source whatever," *unless the facts show that such income is excluded by the qualifying provisions of the 1942 amendment.*

If, as the Court below held in this case, passage of title was the sole test of the taxability of income resulting from the sale of tangible personal property under the Act as originally

enacted, the amendment of 1942 was wholly useless. But, as a matter of fact, the inclusion in the 1942 amendment by Congress of the test with respect to the acceptance of orders shows convincingly that the place of passage of title was never the sole test of taxability under the statute in question. Congress must be assumed to have written the District Act in the light of the authorities, and among the authorities at the time of the enactment of the 1942 amendment were the adjudicated *Compania General* case, *supra*, and the *East Coast Oil Co.* case, *supra*. .The amendment seems to have been enacted in the light of the holdings of those two cases.

Other cases decided by the Court below involving Sec. 2(b), of the District of Columbia Income Tax Act, *supra*, are *Eastman Kodak Co.* v. *District of Columbia, supra*, footnote 11 (where both the *Compania General* and *East Coast Oil Co.* cases, *supra*, were cited in support of the statement that "It has been consistently held that, unless a different legislative intention appears, the geographical 'source' of income from the manufacture and sale, or purchase and sale, of goods is in the jurisdiction where the sale is made."); *Electric Storage Battery Co.* v. *District of Columbia*, ____ U. S. App. D. C. ____, 155 F. 2d 867; and *District of Columbia* v. *The H. D. Lee Company, Inc., etc., supra.*

CONCLUSION

It is believed that the Court of Appeals has herein decided a question of substance relating to the application of an Act of Congress, which is one of material consequence to the revenues of the District of Columbia [20] and to the taxpayers thereof, and that in so doing, the Court has not given proper

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[20] A new income and franchise tax bill for the District was passed by the House June 9, 1947 (H. R. 3737, 80th Congress, 1st Session). The decision in this case would be important under that bill, if enacted into law because of the provisions of Titles VII, VIII and X, Art. I, of the bill.

effect to either the wording of the statute or the opinions of this Court.

Wherefore, it is respectfully urged that the writ be granted.

Respectfully submitted,

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